In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY of AGRICULTURE,
And The UNITED STATES OF AMERICA
PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION,
COMPANY, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

The Respondent, Glover Livestock Commission Company, Inc., sincerely feels that its rights have been overlooked in the overall machinery of government and beseeches the majority in this cause to take one further look at the briefs on file and its opinion, as hereinafter discussed, from the Respondent's view-

point which is best stated in the words of an Athenian scholar who uttered them some seventeen hundred years ago:

"Strike, if you will, but hear me."

1. The penalty invoked against Glover was the most severe ever ordered by the United States Department of Agriculture against a market agency and is, in fact, the only suspension ever invoked against such an agency in the absence of a confession of guilt or a fact finding, after a full evidentiary proceeding, of a deliberate and flagrant violation of the Department's weighing procedures and the exact manner in which the prohibited acts or act were accomplished.

2. The Respondent stands on the position stated in the preceding paragraph, just as its counsel stood before the Secretary's Judicial Officer, the impanelled judges of the Eighth Circuit Court of Appeals, and this honorable Court and challenged the United States Department of Agriculture to cite one case wherein a suspension was invoked against a market agency where the Department had no evidence of a deliberate violation of its weighing practices. Those acting on behalf of the Secretary have cited no such case and have misled this Court and the court below by alleging the existence of such a case or cases and by citing meaningless internally generated compilations or cases having no value as a precedent to the point raised by the Respondent here today and for over three years past.

3. It would seem well settled in administrative law that departmental policy, once established, cannot be changed without valid reasons being given therefor. In the case of this Respondent, no reasons for an obvi-

ous change in departmental policy was given, and this Respondent has and is being treated as if it had no right to even raise that issue.

4. This Court, in the majority opinion, seemingly dismisses the Respondent's right to be heard on this point because the Act in question does not require "uniformity of sanctions" for similar violations. The Act does not so specifically state. However, if the statutory mandate empowers the Secretary of Agriculture to administer the Act in such a manner as to best achieve conformity with the Department's rules and regulations, why does not that same statute empower the Secretary to establish standards by which to gauge the type and extent of sanctions to be imposed? If such broad powers are given the Secretary to penalize and to make fact findings, why do not those same powers include the right to establish "uniformity of sanctions?"

5. If it be conceded that the Secretary has the power to establish "uniformity of sanctions" for the same or similar violations, which he most assuredly has done, then we most earnestly implore this Court to study more closely the Secretary's prior rulings and beseech it to find one single case where the Secretary has ordered a suspension for a weight violation in the absence of a confession or after a full hearing which revealed not only the deliberate and flagrant nature of the violation but also the exact manner in which the wrongdoing was accomplished.

6. Asserting once again that the Respondent, Glover Livestock Commission Company, Inc., denies to this date any weight violations, counsel for the Respondent feels constrained to suggest that the ma-

jority examine with great care its remarks as contained in the first full paragraph on Page 6 of the Slip Opinion and the footnote referred to therein. But for editorial changes and deletion of some of the citations, an almost identical footnote (n. 7) begins on Page 20 of the Secretary's brief, which footnote cites cases and expresses language purportedly to support a position similar to that appearing in the majority opinion about which reference was just made. The cases cited on behalf of the Secretary were fully and completely discredited by the Respondent at Page 20, 21, and 22 of its brief, and all such cases, including those again cited by this Court in the footnote in question, involved guilty pleas under the "Consent Order Procedure." No findings were made and none were necessary. All of these cases were studied in depth by Respondent's counsel and while most contained a paucity of factual material, some of them contained sufficient evidence to indicate, beyond doubt, that the sanctions invoked were most lenient considering the nature of the offense.

7. Counsel for the Respondent is fully mindful of the respect due, deserved and earned by this honorable Court but finds that its duty as an advocate requires that it disagree most violently with the remarks made by this Court in the footnote appearing at Page 6 of the Slip Opinion which, after citing a number of cases, was as follows:

> "These cases involve suspension of registrants under the Packers and Stockyards Act for false weighing of producers' livestock, *and in none was there a finding that the violation was intentional or flagrant.*" (emphasis ours)

Two of the cases cited by the majority were *In re: R. J. Trimble*, 29 A.D. 936 (1970) and *In re: Mary H. Meggs*, 30 A.D. 1314 (1971). The former involved back-balancing the scales and allowing the weighmaster to be a purchaser and in the latter back-balancing the scales ten pounds was found and noted by the Secretary's investigators. *Can these violations be classified, by any stretch of the imagination, as being anything but intentional or flagrant?* Stated somewhat differently, *can* the Secretary place a semantic label on one of his orders and, by that label alone, deny judicial examination of its contents?

8. It is respectfully submited that a careful review by the majority will reflect that:

> "A. The Secretary had previously established a practice of imposing sanctions only in cases of deliberate violations;
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> B. That he was statutorily empowered to establish such a practice;
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> C. That 'uniformity of sanctions for similar violations' had been adopted by the Department as the best method by which to achieve conformity with its rules and regulations, long before the complaint against the Respondent;
>
> D. That the Secretary neither made a fact finding nor stated any conclusion that the Respondent's alleged violations were deliberate;
>
> E. That the suspension here was the only one ever invoked by the Secretary where the alleged violation was not found to be deliberate."

A suspension against the Respondent, under these conditions, surely should not be allowed to stand

judicial review, no matter how limited in scope. It was found by the court below to be "unconscionable" because it was "unwarranted and without justification in fact." The Administrative Procedure Act allows the judiciary to modify or reverse when the penalty is found to be either "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law". Will this Court allow the Department of Agriculture or any other agency of this government to insulate itself from judicial review of any act, no matter how unjust or unlawful, merely because it chose the proper label to place on that act and yet reverse a carefully considered decision of a Court of Appeals merely because of the choice of words used in their written opinion?

Whether the Court's action be "judicial abdication" as suggested in the Respondent's brief, a step closer to "non-reviewability" as stated in the dissenting opinion here or "an unjustificable abdication of the responsibility of judicial review" referred to in an article cited generally in the dissenting opinion,[1] there must be a point beyond which governmental efficiency ceases to justify denial of judicial inquiry into the actual quality of agency justice, and the Respondent suggests that such point has been reached here.

Respectfully Submitted.

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[1]Beyond Discretionary Justice, 81 Yale Law Journal, 575 at p. 581